

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD L. SWARTZ**  
Claimant

VS.

**CHARLES HOLMES TRUCKING**  
Respondent

AND

**FIREMAN'S INSURANCE COMPANY  
OF WASHINGTON, D.C.**  
Insurance Carrier

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Docket No. 1,050,072

**ORDER**

Respondent and its insurance carrier appealed the December 19, 2012, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on March 22, 2013, in Wichita, Kansas.

**APPEARANCES**

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, respondent agreed that if the Board affirmed the ALJ's finding that as a result of claimant's March 4, 2010, work-related accident, claimant sustained a functional impairment, then respondent would not dispute claimant's entitlement to medical benefits.

**ISSUES**

This is a claim for a March 4, 2010, accident. In the December 19, 2012, Award, ALJ Clark awarded claimant benefits for a permanent total disability. The ALJ found the opinions of Dr. Charles E. Bain to be not credible and disregarded them.

Respondent contends ALJ Clark's conclusions that: (1) Dr. Bain's opinions are not credible and (2) claimant's disability was caused by the March 4, 2010, accident are not supported by substantial competent evidence. Respondent maintains that claimant is not entitled to work disability or future medical benefits. Respondent requests the Board reverse the Award and find claimant's symptoms and disability were not caused by his March 4, 2010, accident; that the ALJ's order that respondent pay disability compensation and furnish future medical treatment be vacated; and that the ALJ's finding that Dr. Bain is not credible is not supported by the weight of the evidence.

Claimant asserts he has a permanent total disability and requests the Board affirm ALJ Clark's Award. With regard to Dr. Bain's opinions, claimant maintains, "Respondent failed to provide evidence that Dr. Bain's analysis was scientifically valid and claimant continues to challenge Dr. Bain's opinions based upon *Frye* admissibility standards."<sup>1</sup>

The issues before the Board on this appeal are:

1. Is there a causal connection between claimant's injuries, disability and impairment and his March 4, 2010, work-related accident?
2. If so, what is the nature and extent of claimant's disability? Specifically:
  - A. What is claimant's functional impairment?
  - B. Is claimant permanently and totally disabled?
  - C. If not, what is claimant's work disability?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Claimant was injured in a motor vehicle accident on March 4, 2010, in Oklahoma. Claimant was in a semi-tractor trailer pulling a load of fertilizer, stopped at a traffic signal, when the trailer was struck in the rear by a GMC pickup truck. The Official Oklahoma Traffic Collision Report indicated the speed zone was 35 m.p.h. The brakes on the GMC

---

<sup>1</sup> Claimant's Brief at 1 (filed Feb. 11, 2013).

truck failed and it left no skid marks. The collision report does not contain an estimate of the speed of the GMC truck. Neither the air bags in claimant's truck nor the air bags in the GMC truck deployed. At the time of the accident, claimant was wearing a seat belt. At the regular hearing, claimant testified that his body did not strike the interior of his truck and he did not lose consciousness. Claimant testified the trailer was 48 feet long and was filled with fertilizer.

Claimant testified that on August 20, 2010, he had neck surgery by Dr. Matthew Henry. Two vertebrae in claimant's neck were fused. After the neck fusion, the focus turned to claimant's low back. After reviewing a discogram of claimant's low back, Dr. Henry wanted to perform surgery. Respondent would not authorize surgery. Following an August 30, 2011, preliminary hearing, ALJ Clark granted claimant's request for continued medical treatment from Dr. Henry. According to claimant, Dr. Henry performed a three-level fusion in claimant's low back on October 6, 2011. Dr. Henry did not testify.

After being released by Dr. Henry on April 10, 2012, claimant was referred to Dr. Jeanette Salone, a board-certified physical medicine and rehabilitation physician, for pain management. Claimant saw Dr. Salone on June 27 and August 17, 2012. Dr. Salone indicated claimant's neck surgery by Dr. Henry was a C4-C5 fusion. Dr. Salone testified that Dr. Henry performed the low back surgery because an MRI of claimant's low back had revealed several bulging discs. Dr. Salone indicated claimant underwent a three-level fusion by Dr. Henry at L3-L4, L4-L5, and L5-S1.

Prior to her deposition, Dr. Salone reviewed claimant's medical records, including those of Dr. Henry. Dr. Salone opined that claimant's March 4, 2010, accident caused or aggravated his neck and back injuries. She also reviewed the records of Dr. Charles E. Bain, respondent's expert. Dr. Salone's causation opinion was based upon the history given by claimant. Dr. Salone acknowledged she was not an expert in accident reconstruction or the forces involved in claimant's accident. Nor had she reviewed photographs, accident reports or police reports from the accident.

Using the range of motion model in the *Guides*,<sup>2</sup> Dr. Salone opined claimant had a 20% whole person impairment. In Dr. Salone's opinion, the DRE model is only to be used for instability of the spine. She opined claimant could not perform 42 of 46 non-duplicative tasks, or 91%, that human resource consultant Jerry D. Hardin identified claimant performed in the 15 years prior to the accident. Dr. Salone testified she prescribed claimant MS Contin (a long-acting formula of morphine), Lortab, and Tizanidine (a muscle relaxant). Dr. Salone expected claimant to be on the medications indefinitely.

---

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Salone testified claimant cannot sit or stand very long and would not qualify for sedentary work. Claimant's three-level low back fusion would prevent him from performing an office job.

Dr. Pedro A. Murati evaluated claimant on May 30, 2012. He reviewed claimant's prior medical records, and was aware claimant sought medical treatment in 2008 for low back complaints. Dr. Murati's diagnoses were: (1) status post anterior cervical discectomy with interbody fusion and anterior instrumentation at C4-C5; (2) status post L3-L4, L4-L5 and L5-S1 anterior lumbar discectomy with interbody prosthetic device placement; (3) status post apparent three-level fusion; (4) a mid thoracic sprain; and (5) failed back surgery syndrome.

It was the opinion of Dr. Murati that within reasonable medical probability claimant's diagnoses were a direct result of the March 4, 2010, accident while employed at respondent. Dr. Murati opined that claimant was in: (1) DRE Cervicothoracic Category IV for a 25% whole person functional impairment; (2) DRE Lumbosacral Category V for a 25% whole person functional impairment; and (3) DRE Thoracic or Lumbar Category II for mid back pain, for a 5% whole person functional impairment. The foregoing functional impairments combined for a 46% whole body functional impairment. Dr. Murati indicated claimant had segmental instability in the neck and low back. Claimant also had radiculopathy from the low back injury and a mid thoracic back sprain.

Dr. Murati assigned claimant numerous and significant restrictions. He opined claimant was realistically and essentially unemployable. It was also the opinion of Dr. Murati that claimant could not perform 40 of 46 non-duplicative tasks, or 87%, identified by Mr. Hardin.

On cross-examination, Dr. Murati acknowledged he had no training in vehicular dynamics or forensic biomechanics. Nor did Dr. Murati review the police reports from claimant's accident.

Dr. Charles E. Bain, an expert employed by respondent, is both a medical doctor and has a bachelor's degree in nuclear engineering. He was certified in Canada in family and emergency medicine. He left clinical medicine in 2003 to join Biodynamic Research Corporation (BRC) as a consultant. In 2006, he became a certified traffic accident reconstructionist. While working in family and emergency medicine, he treated hundreds of patients with spinal disorders.

The curriculum vitae of Dr. Bain indicated that he is registered with and certified by the Accreditation Commission for Traffic Accident Reconstruction (ACTAR). In order to become certified by ACTAR, Dr. Bain completed the ACTAR I and II courses, which were ten and five working days long, respectively. He then passed the ACTAR examination.

Dr. Bain testified that when he completes a vehicle injury causation analysis (ICA), he follows a three-step procedure. First, he determines what happened to the vehicles through accident reconstruction. The second step is to understand what happened to the occupants of the vehicles, which is called occupant kinematics. In this second step, the forces on the body and the direction of those forces are learned. The third step utilizes biomechanics to determine the effects of those forces upon the person's body. Medical records are used to look at the person's complaints, the treatment rendered and then determine if the diagnoses are related to the accident.

In performing his analysis, Dr. Bain reviewed claimant's preliminary hearing testimony, photos from the accident and the Official Oklahoma Traffic Collision Report. Dr. Bain believed he was in a better position to give a causation opinion than the doctors who treated claimant, because those doctors simply took claimant's word that his injuries were caused by the accident.

Dr. Bain utilized a computer program to determine the delta-V of the vehicles. Delta-V is the change in speed of a vehicle after impact. Speed at impact is different than delta-V. The greater the delta-V speed, the more force upon claimant's body. According to Dr. Bain, giving claimant the benefit of the doubt, the GMC pickup truck had a delta-V of 27 m.p.h. However, Dr. Bain believed it was more realistic that the delta-V for the pickup truck was in the 12 to 15 m.p.h. range. Dr. Bain indicated the air bags on the GMC truck would normally deploy at a delta-V speed above 14 m.p.h. Dr. Bain opined the delta-V of the tractor-trailer claimant was driving was 1.7 m.p.h. if the delta-V of the pickup was 27 and 1.1 m.p.h. if the delta-V of the pickup was 15.

Dr. Bain opined that the forces upon claimant's body were biomechanically trivial. Dr. Bain testified that a person would not get hurt if he or she were subjected to the same force 100 times a day. It was Dr. Bain's opinion that there was no causal relationship between claimant's complaints and the March 4, 2010, accident. He testified:

Mr. Swartz has a degenerative condition in his spine. It's been long-standing. It was not affected by this event. It wasn't affected by him climbing in and out of his tractor that day, which put far greater forces on his neck and back than this event did. I mean, this -- Mr. Swartz has these complaints that appear to have started after this event. They aren't physiologically due to this event. . . .<sup>3</sup>

On cross-examination, Dr. Bain acknowledged that 97% of BRC's work was on behalf of defendants and he has performed between 1,300 and 1,400 ICAs. Dr. Bain also admitted that his testimony was disallowed or limited in various cases in Texas, New York, Louisiana, Missouri, Nevada, and Florida for various reasons, including that his ICA was unreliable. Dr. Bain acknowledged that he performed no tests in analyzing claimant's

---

<sup>3</sup> Bain Depo. at 58.

accident, did not examine or speak to claimant and did not speak to the other driver. He never saw the actual vehicles after the accident and did not know if the air bags on the GMC truck were functional.

Dr. Bain testified that in order to complete a proper ICA, it is generally necessary to know the position of the body at time of impact. He also opined that in order to have a traumatic disc injury, a person must have a disruption of the spinal column, whether it is a bone disruption or a ligamentous disruption.

Dr. Bain indicated that claimant's foot was likely on the brake, but that upon impact the pressure between claimant's foot and the brake decreased, allowing the tractor and trailer to move forward. How quickly claimant reapplied his foot to the brake would determine how far the truck and trailer rolled. However, Dr. Bain acknowledged that he never spoke to claimant and assumed claimant's foot was on the brake.

At the request of respondent's counsel, rehabilitation consultant Karen Crist Terrill evaluated claimant to determine the tasks involved in his past relevant work and to determine claimant's loss of wage-earning ability as it related to his work-related injury. Ms. Terrill personally interviewed claimant on July 17, 2012, and was provided medical records from Dr. Henry. Dr. Henry restricted claimant to lift no more than 40 pounds for four weeks, and then the restrictions could be removed. Ms. Terrill took the 40-pound weight restriction imposed by Dr. Henry and applied it against the job tasks claimant performed. Ms. Terrill opined that claimant had a 56% task loss. If the 40-pound weight restriction were removed, claimant would have no task loss. With the 40-pound restriction, Ms. Terrill opined that claimant would not be permanently and totally disabled, as there were jobs in the open labor market that he could perform.

At Ms. Terrill's deposition, claimant's attorney objected to Dr. Henry's records and restrictions on the grounds they were hearsay. On cross-examination, Ms. Terrill agreed that based upon the restrictions of Dr. Salone, claimant was permanently and totally disabled.

Jerry D. Hardin, a human resource consultant, evaluated claimant at the request of claimant's attorney. Mr. Hardin personally interviewed claimant on May 24, 2012, and was provided restrictions placed upon claimant by Dr. Henry. After completing his report, Mr. Hardin was provided with a report by Dr. Murati with the doctor's restrictions for claimant. Utilizing the restrictions of either Dr. Henry or Dr. Murati, Mr. Hardin opined claimant was essentially and realistically unemployable and should be on Social Security. Mr. Hardin testified that if he utilized Dr. Salone's opinion that claimant could not be placed in the sedentary category, claimant was essentially and realistically unemployable.

**PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>4</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>5</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>6</sup>

The critical issue in this claim is whether claimant’s injuries, disability and impairment are the result of the March 4, 2010, work-related accident. The resolution of that issue is dependent upon the credibility of respondent’s expert witness, Dr. Bain. Respondent argues that Dr. Bain’s opinions are uncontroverted. Respondent asserts that claimant is relying on faulty post hoc, ergo propter hoc reasoning that because claimant’s injuries occurred after the accident, the accident was the cause of the injuries. Claimant contends Dr. Bain is not a credible expert and lacks qualifications to testify about injury causation analysis.

The Board is mindful of the well established maxim of workers compensation law that uncontradicted evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy.<sup>7</sup> The Board is also quite familiar with the maxim of post hoc, ergo propter hoc. In *Gann*,<sup>8</sup> the Kansas Court of Appeals stated, “The maxim *post hoc, ergo propter hoc* denotes the fallacy that ‘because one event occurred before another, the first was the cause of the second.’ . . . When the salient question is the cause of a medical condition, the maxim of *post hoc, ergo propter hoc*, is not competent evidence of causation.”

---

<sup>4</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>5</sup> K.S.A. 2009 Supp. 44-508(g).

<sup>6</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

<sup>7</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>8</sup> *Gann v. Driver Management, Inc.*, No. 95,368, 2006 WL 3589971 (Kansas Court of Appeals unpublished opinion filed Dec. 8, 2006).

The Board agrees with ALJ Clark that the opinions of Dr. Bain are not credible. The Board is cognizant that several courts in other jurisdictions have disallowed Dr. Bain's testimony because his injury causation analysis was unreliable, while other courts have allowed Dr. Bain's testimony and expert opinions. The fact that Dr. Bain was certified by ACTAR after completing two short classes and passing an examination is worrisome. However, the Board chooses to focus on what Dr. Bain did and did not do in performing his injury causation analysis.

Dr. Bain did not speak to claimant, the driver of the other vehicle or claimant's doctors. He did not examine claimant or the two vehicles involved in the accident. He assumed claimant's foot was on the brake at the time of the accident and did not know if the air bags were functional on the GMC truck that struck the trailer. Dr. Bain acknowledged he did not perform any tests to analyze the accident and could not use the force he determined occurred in the accident to determine how far claimant's trailer and tractor moved.

Using pictures from the accident, Dr. Bain input the amount of "crush" of the GMC truck that struck the trailer into a computer program. The computer program determined the GMC truck's delta-V was 27 miles per hour, but Dr. Bain opined the delta-V was closer to 12 to 15 miles per hour. He then concluded the resulting delta-V of claimant's truck was trivial. Dr. Bain's opinions largely are based upon photos of the GMC truck and a computer program. Dr. Bain largely ignored that the GMC truck was traveling in a 35 m.p.h. speed zone, the brakes failed and it left no skid marks.

Following the accident, claimant underwent cervical and low back surgeries to fuse vertebrae, yet Dr. Bain opined that the forces upon claimant's body were biomechanically trivial. The Board finds Dr. Bain made too many assumptions, used insufficient data and relied on a faulty methodology to arrive at his opinions. Therefore, the Board disregards Dr. Bain's opinions as untrustworthy.

Unlike Dr. Bain, Drs. Salone and Murati actually spoke to claimant. The Board finds convincing Dr. Salone's opinion on causation. Dr. Salone took a history from claimant and reviewed the records of Dr. Henry, MRI tests and the records of Dr. Bain. Dr. Salone opined claimant's preexisting neck condition was aggravated by the March 4, 2010, accident. With regard to claimant's back, Dr. Salone indicated some of claimant's bulges may have preexisted the accident and some may have been a direct result of the accident, but either way the accident aggravated any preexisting low back condition.

Keeping in mind the maxim of post hoc, ergo propter hoc, the Board finds it significant that claimant's back symptoms were minimal before the accident. Claimant had passed a Department of Transportation physical prior to the accident. Claimant testified that the force of the accident moved the tractor and trailer three to four feet, and his body was jarred. Approximately 30 minutes after the accident claimant began experiencing neck



and low back pain. The same day as the accident, claimant was advised by a physician to go to the emergency room.

Taking into consideration: (1) Dr. Bain's opinions are untrustworthy; (2) the opinions of Drs. Murati and Salone that the March 4, 2010, accident caused claimant's injuries or aggravated claimant's preexisting conditions; and (3) claimant's testimony, the Board finds claimant has proven that his injuries, disability and impairment were the result of his accident.

Dr. Murati opined claimant had a 46% whole body impairment and Dr. Salone determined claimant had a 20% whole body functional impairment. Dr. Murati placed claimant in DRE Cervicothoracic Category IV and DRE Lumbosacral Category V, which require a loss of motion segment integrity of greater than 3.5 mm for a cervical vertebra and greater than 5 mm for a lumbar vertebra. Dr. Murati testified that Dr. Henry would not have performed neck and back surgeries had there not been a loss of motion segment integrity. However, Dr. Murati confirmed there was no way to tell the amount of loss of motion segment integrity claimant had before the surgeries. Therefore, the Board finds that Dr. Salone's opinion that claimant sustained a 20% whole body impairment is more credible and adopts the same.

The Board affirms ALJ Clark's conclusion that claimant is permanently and totally disabled. Dr. Salone testified that claimant would not qualify for sedentary work. Dr. Murati opined that claimant is realistically and essentially unemployable. Mr. Hardin indicated that based upon either Dr. Murati's or Dr. Salone's restrictions, claimant was essentially and realistically unemployable.

Based upon the restrictions of Dr. Henry, Ms. Terrill opined claimant was employable, while Mr. Hardin opined claimant was essentially and realistically unemployable. Dr. Henry's restrictions were given to claimant on April 10, 2012. Ms. Terrill's report to respondent's counsel is dated July 31, 2012. Ms. Terrill testified she did not know if those restrictions were still in place. At Mr. Hardin's deposition, respondent objected to Exhibit 3, which included Dr. Henry's work release setting forth claimant's restrictions. Dr. Henry did not testify. Therefore, his work release is hearsay. Moreover, Dr. Henry's work release indicates the restrictions are only for four weeks and thereafter may be gradually lifted as tolerated by claimant. For the foregoing reasons, the Board chooses to disregard the aforementioned opinions of Ms. Terrill and Mr. Hardin, to the extent they are based on Dr. Henry's restrictions.

The Board finds claimant is permanently and totally disabled. Therefore, it is unnecessary to determine claimant's work disability.

**CONCLUSION**

1. The Board finds that claimant's injuries, disability and whole body impairment resulted from the March 4, 2010, accident.
2. Claimant has a 20% whole body functional impairment.
3. Claimant is permanently and totally disabled.
4. It is unnecessary for the Board to determine the nature and extent of claimant's work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board modifies the December 19, 2012, Award entered by ALJ Clark by finding claimant sustained a 20% whole body functional impairment, and affirms the remainder of ALJ Clark's Award.

Should claimant's counsel desire a fee for his services, he should present that matter to the ALJ.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2013.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

---

<sup>9</sup> K.S.A. 2012 Supp. 44-555c(k).

c: Brian D. Pistotnik, Attorney for Claimant  
brianpistotnik@pistotniklaw.com

Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier  
nburghart@fairchildandbuck.com; swohlford@fairchildandbuck.com

John D. Clark, Administrative Law Judge